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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAMES MACON, THE FLORIDA SUN, GLADYS MACON

Petitioners,

v.

CITY OF ORLANDO,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Did the Eleventh Circuit correctly uphold a judgment of a trial judge who found no constitutional error in Orlando, Florida's use of warrantless searches to photograph and seize, among other things, "household furnishings, and all other objectionable, unsightly or unsanitary matter," from residential curtilage, at times solely to protect the economic welfare of real property of some owners in a black neighborhood, as determined by a single inspector issuing citations for violations on adjacent land?

(2) To assure due process of law in the federal courts, is review de novo required on appeal from lower court rulings upholding the validity of a local ordinance challenged on its face and as applied, especially for its inhibitory effect on constitutional rights exercised by blacks?

PARTIES

All parties to the proceedings are set forth in the caption. Bill Frederick, former mayor of Orlando, Florida, and Mable Butler, former city commissioner of Orlando, Florida, were sued in their official capacities only. No reference was made to their successors, because they had particularized roles and individual intentions relevant to the actions below, while they were in office. The only respondent therefore subject to this legal action at this time is the City of Orlando, Florida. However, the actions and intentions of the former mayor and former city commissioner continue to be germane to those of the muncipality in these proceedings.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES MACON, THE FLORIDA SUN, GLADYS MACON

Petitioners,

v.

CITY OF ORLANDO,

Respondent.

==========

PETITION FOR A WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

==========

Petitioners James Macon, the Florida Sun he publishes, and his spouse Gladys Macon, with whom he has lived in Orlando, Fla., for more than 25

years, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered on Dec. 11, 1992.

CITATIONS TO OPINIONS BELOW

Neither a stay of mandate nor the judgment itself of the United States Court of Appeals for the Eleventh Circuit--a denial of petitioners' motion for rehearing and suggestion for rehearing en banc--is reported. They are reprinted in the appendix at pp. 1a-2a, and pp. 3a-4a respectively. Also not reported to date is the per curiam affirmance without opinion that either the judgment of the district court was based on findings of fact that are not clearly erroneous or that it was entered without an error of law. It is reprinted at p. 5a. The trial court's denial of Rule 11 sanctions, judgment, and opinion memorandum of law also are not reported. They are reprinted at p. 6a, p. 7a, and starting at p. 8a respectively.

JURISDICTION

The judgment of the court of appeals affirming without opinion the district court's judgment and findings for defendants on all counts was entered on July 10, 1992. A timely suggestion for rehearing and rehearing en banc was denied on Dec. 11, 1992. On March 3, 1993, an appeals court judge entered a stay of the mandate of that court, effectively to continue until final disposition of the case. On March 8, 1993, Justice Anthony M. Kennedy entered an order extending the time for filing a petition for writ of certiorari to and including April 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS AND LOCAL APPELLATE COURT RULE

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people...to petition the Government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated....

The Fifth Amendment to the United States Constitution provides in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the United States Constitution, Section 1, provides in pertinent part that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1982, in Volume 42 of the United States Code, of the Civil Rights Act of 1871, provides in pertinent part:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to...hold...real and personal property.

Section 1983, in Volume 42 of the United States Code, of the Civil Rights Act of 1871, provides in pertinent part:

> Every person, who, under color of any...ordinance...of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.....

Rule 36.1 for the U.S. Court of Appeals for the Eleventh Circuit provides in pertinent part:

> Affirmance Without Opinion. When the Court determines that any of the following circumstances exist: (a) judgment of the district court is based on findings of fact that are not clearly erroneous;...(e) judgment has been entered without an error of law; and an opinion would have no precedential value, the judgment or order may be enforced without opinion.

BEST AVAIL

CHALLENGED MUNICIPAL ORDINANCE PROVISIONS

The provisions of the Orlando Lot Cleaning Code challenged as unconstitutionally overbroad and/or vague on their face and/or as applied to petitioners James Macon, the Florida Sun weekly targeted to a local Orlando African-American audience, and his spouse, are set forth in full in the district court opinion in the appendix.

STATEMENT OF THE CASE

For himself and the weekly he had prepared and published since 1975, petitioner James Macon filed a civil rights action against the City of Orlando and its mayor on April 13, 1989. Macon sought to enjoin warrantless searches on real property he owned, including his homestead from which he prepared the Florida Sun for publication and for circulation of several thousand copies.

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For years, the City of Orlando had taken actions, which Macon testified without contradiction had interfered with his publication of the weekly[1]. For instance, in 1986, the City had cited and towed a trailer containing equipment used to publish the newspaper, which was on the Macon homestead.

During that time, in the Florida Sun, Macon had published articles concerning racism in, and litigation taking place against, the City. He also reported and wrote about a zoning dispute involving him and Mable Butler.

1--The facts are taken from the district court memorandum included herein in the appendix, except for those derived from the transcript of evidence admitted at the two-day trial, on March 19-20, 1991, which do not contradict the judge's findings, although they may not support the conclusions he made from them.

At the time, Mable Butler was commissioner serving one of the City's six councilmanic districts, one of the two with predominantly black populations forming Orlando's Southwest quarter, where the Sun has been circulated. Before the described controversies, in the early '80's, she and the City had advertised in the weekly.

The only black City lot/housing inspector, during the period after information critical of Orlando was published in the Sun, was assigned exclusively to cover Lot Cleaning Code ("LCC") violations in those two Southwest districts. Thirty percent of Orlando's population is black and most reside in those sections policed by Inspector Larraine Danzy-Hamilton ("Inspector Hamilton").

In 1988-90, Inspector Hamilton on several occasions cited the Macon homestead and real property he rented elsewhere in the neighborhood for alleged LCC violations. On Feb. 17, 1989, to determine whether LCC violations might exist in

the back yard of the property tenanted by Oscar Beachum and his family, Inspector Hamilton proceeded to an area of curtilage not exposed to public view, and took photographs. She had reason to believe there might be violations, because of complaints from a neighbor, Verna Mann.

Mrs. Mann's owned home and property abutted the tenanted place. Based on what she could detect from the neighbor's place, Mrs. Mann earlier complained to Commissioner Butler. Inspector Hamilton testified complaints passed on from city hall were given priority.

At trial, a white city commissioner, Jeff Clark, testified that neither he nor his constituents in his predominantly white district had sought enforcement of the code against owners of surrounding property. Bill Frederick, Orlando's mayor at the time, testified a survey revealed greater demand in Orlando in black neighborhoods for enforcement of housing and lot violations than

there had been elsewhere in the community. Frederick used a column he occasionally wrote for the Orlando Times weekly, rival to the Sun for local black audiences, to urge those readers to keep the municipality informed about "eyesores."

By June, 1988, the tenanted Macon property had been cited once before within the previous 12 months for alleged LCC violations in public view. So Macon got a notice of a mandatory $100 fine.

Neither the notice nor the law at the time made any provision for an appeal as of right from the mandatory fine. During the course of the litigation, the City did alter the LCC to permit a five-day grace period after citation for corrective action, presumably including the taking of an appeal. But in June, 1988, Macon was given no reason to believe he could challenge the automatic fine.

In 1989, Macon learned that whites who appeared before the City Council were being given monetary reductions when they took issue with

mandatory lot cleaning fines on their property.

On Feb. 22, 1989, Macon received an invoice to inform him that the mandatory $100 administrative penalty or fine imposed because the rental property had been cited twice within 12 months had to be paid by March 21, 1989.

Two days earlier, the City sent its final notice of alleged LCC violations cited by Inspector Hamilton on Feb. 10, 1989, at the Macon homestead. They were similar to those alleged at his rental property.

Macon asked to be heard by the City Council and a hearing was to be held on March 27, 1989. On Good Friday, March 24, 1989, while Macon was at his homestead preparing the following week's Sun, private contractors appeared there to clear the curtilage on all portions of the yard areas surrounding the house, regardless of public visibility.

When Inspector Hamilton arrived, Macon refused to consent to their entry on his property.

She called her supervisor, who told her to proceed with the cleanup. The supervisor sent a police escort to watch over the cleanup. The Macons were charged $509 for this cleanup.

At the March 27th Council meeting, at which the supervisor presented photographs taken of the alleged violations at the homestead as well as the rental property, the mayor and the six members present voted unanimously in support of a motion made by Commissioner Butler to reduce the $100 fine or provide any other relief to Macon.

At the outset, Commissioner Butler had been asked by Macon's counsel not to participate, because she had initiated the complaint at the tenanted property which resulted in the cited violations. The mayor also had been asked to step aside because the column he provided to the Times rival to the Sun suggested he might be biased in favor of stricter enforcement of the LCC in the black neighborhoods generally and against Macon in particular. Those city officers refused recusals.

Petitioners below and here challenge as unconstitutional severable provisions of the LCC on their face, and its application through enforcement by warrantless intrusions on the homestead and rental properties owned by the Macons.

UNCONSTITUTIONALITY OF THE LOT CLEANING CODE

The LCC imposes a "duty of the owner of each lot, tract or parcel of land within the City to reasonably regulate and effectively control excessive growth and accumulations, as enumerated" including certain specified items "and all other objectionable, unsightly or unsanitary matter....be it uncovered or under open shelter, to the extent and in the manner that such lot, tract or parcel of land...endangers the public health, safety, or welfare...or adversely affects and impairs the economic welfare of adjacent property," LCC §§28.15 and 28.16. In upholding the LCC as not being vague or overbroad, the trial judge cited only other specific language from the provisions in his conclusions and findings which are not challenged.

BEST AVAILA

Only the quoted duties and the severable obligations for the distinct severable purpose of protection of adjacent properties are challenged, when there has been no showing that the alleged failure of a property owner to take corrective action threatens or endangers public health, safety or welfare, or does not meet aesthetic standards.

The trial judge did find that the LCC has, as a legitimate public purpose, the protection of "the public health, safety, and welfare," and prevention of "economic or aesthetic harm to the surrounding neighborhood" (emphasis added here). The judge thus avoided the actual issue raised by petitioners here, whether the Macons had a duty to regulate and control their land to avoid specific economic harm to a neighbor whose property abuts theirs.

TESTIMONY OF THE LCC INSPECTOR

LCC Inspector Hamilton testified on March 9, 1991. She specifically stated that she takes into account in determining whether there is an LCC

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violation, economic harm to the property of an adjacent neighbor, (Transcript, Day One, p. 4). She cites items that are "downgrading the next door neighbor's property that keeps it all nice, green grass, trying to keep (up) her yard...." (id., p. 13).

Inspector Hamilton testified that during her training period she was informed the LCC was the method used by the City "to keep up the neighbor-...you have some property owners and tenants that just don't want to keep the property up and then it lowers the value of other adjoining properties," Inspector Hamilton testified (id., p. 10).

Inspector Hamilton described her knowledge of zoning and lot cleaning code requirements as having come from on-the-job-training (id., p. 13). During training she got as a "cruiser" before she was empowered to issue citations on her own, she toured the entire city. However, after she became an LCC inspector, he worked only in the Southwest neighborhoods, the black areas (id., p. 39).

Before she became an inspector in 1988, she was told the law permitted her to have access to properties for enforcement purposes (id., pp. 42-43), including "areas that cannot be visibly seen from a public area (id., p. 41)."

Once in such areas, although Inspector Hamilton had no training in photography, she took the photographs later relied on to assess violations without any appearance or corroboration by her (id., p. 15). "I photograph what I consider as far as a judgment call a violation, an excessive amount, an unsafe condition, my own judgment call (id.)."

All of her intrusions were made under the LCC without search warrants. Though the inspector, her supervisor, the mayor, the city attorney, etc., testified during trial, none suggested that there had been or would be any occasion in which a warrant is needed to enforce the LCC.

For enforcement purposes, e.g. by contractors to enter Macon grounds, a city attorney conf-

firmed at the request of the trial judge that without warrants "for the purpose of cleaning to enforce the section, one has the authority to enter," (id., pp. 62-63).

THE WARRANTLESS INVASION AT THE HOMESTEAD

After enumerating the evidence of entry by the contractors of the cleanup of curtilage surrounding the Macon homestead without the owners' consent, at the direction of the City inspector protected by police escort requested by her supervisor, as is routinely done when objection is made to the instrusion, the judge stated that "(t)he court finds that there was little proof offered concerning any fourth amendment privacy interest at the (homestead) property and therefore no search in violation of the fourth amendment occurred."

Inspector Hamilton was more specific about why the police were called, though Macon did not tell her to get off the property, (id., p. 27). "(He refused to let us clean the property. In order to"

"clean the property, the contractor has to have permission to get on the property. So we needed a police escort," (Hamilton testimony, supra, p. 28).

THE WARRANTLESS INVASION AT THE RENTAL SITE

After finding there was evidence of an intrusion at the residence the Macons leased, "specifically the backyard of the property," the judge found that the petitioners Macon had "no reasonable expectation of privacy, because that area "was in plain view of others," i.e., the next door neighbor and those from the City she invited on her property to see alleged LCC violations.

At no point was there testimony by anyone that the backyard was exposed to general public view, for instance that of anyone passing by on the street or even by helicopter. Both Hamilton, (id., at 60-61), and the tenant, Oscar Beacham, (Transcript, Day 1, pp. 101-102), testified that the overhanging growth which was cited impaired the view of a general public at curbside, or above.

Finding no constitutional violations by the City of the LCC on its face, or as applied in warrantless invasions of curtilage, or backyards obscured from general public view, or violations of federal constitutional and statutory law because of racial or other municipal discrimination with requisite intent and/or with disparate enforcement of the Code against the real properties of a black newspaper publisher, including a homestead where the weekly was produced, the trial judge found for all defendants and against all plaintiffs.

Commissioner Butler had been added as a defendant after the start of the action, when her role in initiating action against Macon was revealed fully at an evidentiary hearing on a request by him for preliminary relief. Gladys Macon was added at the request of the City as a party, because she jointly owns the affected property.

In keeping with the judge's findings of July 1, 1991, judgment was entered that day. Defendants were awarded costs. Plaintiffs appealed.

On Aug. 16, 1992, the trial judge denied defendants' motion for Rule 11 sanctions. He said: "Although the plaintiffs' claims were not meritorious in the end, the fourth amendment claim, as well as the claims of vagueness and overbreadth, was potentially valid."

After briefing to the U.S. Court of Appeals, oral argument was presented on June 29, 1992. On July 10th, the hearing panel entered an affirmance in an unpublished form, in accordance with a circuit court rule. That rule affirms the judgment only, either because findings of fact were not erroneous or there was no error of law or both.

Petitioners timely filed a suggestion for rehearing or rehearing en banc. On Dec. 11, 1992, the suggestion was declined.

On March 3, 1993, an appellate judge granted plaintifs-appellants' stay of the Eleventh Circuit mandate pending disposition here. The request had been opposed by counsel for defendants-appellees.

REASONS FOR GRANTING THE WRIT

I. THIS COURT TO DATE HAS NEVER ALLOWED THE KIND OF DESCRIBED INCURSIONS ONTO PRIVATE REAL PROPERTY BY PERSONS ACTING UNDER COLOR OF LAW TO ENFORCE A DUTY TO PROTECT THE LAND OF OTHERS WHEN THERE IS NO EMERGENCY. .

To encourage a good neighbor policy, Orlando, Fla., since the late 1980's, has imposed by ordinance an explicit duty on property owners to maintain their lots, tracts, and parcel of lands, to avoid adverse effect on and impairment to the economic welfare of adjacent properties.

That duty is severable from provisions to further legitimate municipal purposes for preservation of health, safety, welfare or esthetics. In 1987-88, three inspectors were assigned exclusively to enforce that law, such assignments previously having been handled by housing inspectors.

Each inspector is limited functionally to two of six councilmanic districts. The only black on the housing/lot code inspection staff was assigned exclusively in 1988 to the two districts in which most of Orlando's 40,000 African-Americans reside. They comprise 30% of the population.

Never having been a housing inspector, the high-school educated black, Inspector Hamilton, received only on-the-job training as a "cruiser" learning about local code enforcement. She stated without contradiction that she was informed she could enter properties without a search warrant to determine if there were code violations.

Also without contradiction, Inspector Hamilton testified that she did issue citations to perceived code violators whose properties were eyesores adversely affecting the value of land of their neighbors who kept their lawns neat.

In 1988, the Orlando mayor had informed readers in his written contribution in a weekly targeted to blacks that they should report such eyesores so the City could get tough on code violators. No similar message is known to have gone to general or white audiences. A white commissioner testified that neither he nor his predominantly white constituency sought such enforcement.

In 1988, Mable Butler, a black commissioner, referred complaints from neighbors to the city code enforcement bureau, about property leased by the Macons to Oscar Beachum in the black neighborhood. Inspector Hamilton testified referrals from commissioners were given priority.

On June 27, 1988, without consent, she proceeded by the side of the residence on the Macon rental property, into the back yard, obscured from public view, including from above by overhanging foliage. The yard was only observable from the real property of a complaining neighbor.

Inspector Hamilton took photographs of what she perceived to be violations, and left. Several months earlier, she had cited the property for front yard violations visible from the street.

The second warrantless intrusion incurred on Good Friday, March 24, 1989, at the Macon homestead in the black section, while he was preparing the Florida Sun for publication. When Inspector Hamilton arrived, he informed her that he would be appearing at the City Council the following Monday to seek discretionary relief from a $100 mandatory fine imposed as a result of the second citation at the rental property. He asked for further delay on the cleanup at the homestead, which also had been cited by Inspector Hamilton.

Inspector Hamilton telephoned her supervisor and received authority for a police escort, because Macon was refusing entry onto the curtilage surrounding his house. Private contractors hired by the City already were there to

clear the land until it satisfied the inspector's subjective standard, including her views of the economic welfare rights of adjacent neighbors.

The trial judge denied that there was any violation of privacy at the homestead to warrant Fourth Amendment consideration. He did apply the Amendment to the intrusion in the other instance, but upheld the invasion into the tenant's backyard.

On appeal, at oral argument, Macons' counsel informed the Eleventh Circuit panel that this Court had taken jurisdiction to hear a petition from the Seventh Circuit to determine Fourth Amendment parameters in which no violation had been found, because there was no apparent invasion of privacy.

Less than two weeks later, the Eleventh Circuit did not affirm or adopt the trial judge's reasoning, but accepted his judgment in this matter. In papers for a rehearing or hearing en banc, the Eleventh Circuit was urged to await the outcome here of the petition from the Seventh Circuit.

On Dec. 8, this Court unanimously reversed the Seventh Circuit decision in Soldal v. Cook County, Ill., 113 S.Ct. 538 (1992). Unlike the trial judge here, this Court determined that the Fourth Amendment had been implicated by the removal of a trailer by private parties in the presence of police authority, even though no "invasion" of privacy was said to have occurred. Soldal was remanded for determination of constitutional violations, that is, whether the seizure was unreasonable in light of the circumstances.

On Dec. 11, the Eleventh Circuit declined to grant a rehearing in this case. But one of the panel judges later granted a stay of the mandate after plaintiffs-appellants sought to petition this Court.

Petitioners now are asking this Court to reverse, or remand for further consideration, not only the described intrusion at the homestead where no invasion of privacy was found below, but also for review of ongoing municipal use of

warrantless searches and seizures onto curtilage not visible from public view to enforce an inspector's subjective view, especially in a black neighborhood, about whether owners are maintaining land to avoid impairment of, or adverse effects to, economic welfare of neighboring properties.

No ruling of this Court or any reported decision below appears to endorse such warrantless intrusion into backyards, especially in an urban setting, when the land is not open to view by anyone, i.e. the general public, whether from the ground or in the air. Such invasion certainly has not been contemplated for "seizures," for capturing the moment in photographs or for removal without warrant of, say, a trailer containing newspaper equipment, or furniture, or usable appliances.

In Florida, such intrusion into an unfenced backyard not visible from street or front yard, long has been held to implicate the Fourth Amendment and, when unreasonable, to void use of

evidence of criminal conduct obtained on the property, State v., Morsman, 394 So.2d 408 (Fla. 1981) and State v. Rickard, 420 So.2d 303 (Fla. 1982).

In upholding such warrantless instrusion into backyards by view from the air, this Court's majorities to date have assumed the sighting to be available to any member of the public, e.g. flying through public space, California v. Ciarolo, 476 U.S. 207 (1986), Riley v. Florida, 488 U.S. 445 (1988). Further, in Ciraolo, such sighting was viewed as necessary to provide a basis to get a warrant, say to take photographs lawfully of alleged violations.

On the ground, when warrantless intrusion has been tolerated, say, into trash left for removal by third parties, a Court majority has stressed that the debris was not taken from property, but left outside its perimeters, on the street, on the sidewalk, and thus open to public view, California v. Greenwood, 486 U.S. 35 (1988).

Despite such limitations, those decisions

stress that the Fourth Amendment is intended to protect a "free and open society." Were this Court to let these lower court decision(s) stand, that concept would be mocked. We are not yet a closed society in which (1) neighbor is asked to spy on neighbor; (2) a public official can initiate a warrantless intrusion onto property of a newspaper publisher with whom she disagrees, for the taking of embarrassing photographs and imposition of fines; (3) an inspector insists that property be maintained to avoid embarrassment of the neighborhood, of people of her own race; or (4) a neighbor demands adjacent property be maintained, so as not to impair the value of her own.

Yet all these circumstances have occurred here. So this Court should reverse and then remand for further consideration, now that it has been decided that the Fourth Amendment can be implicated, even when there is no ostensible "invasion of privacy," Soldal v. Cook County, supra.

II. DUE PROCESS OF LAW REQUIRES APPELLATE REVIEW DE NOVO OF SUBSTANTIAL CONSTITUTIONAL CHALLENGES TO A LOCAL LAW ON ITS FACE, AND AS APPLIED TO CHILL PETITIONERS' LAWFUL CONDUCT.

By affirming only the judgment but not the memorandum opinion analyses of several substantial constitutional claims made by the trial judge, and by declaring its own ruling not to have precedential value, the Eleventh Circuit has acted in a way that conflicts with applicable decisions of this Court. For instance, as noted, the Eleventh Circuit failed to reconcile the Fourth Amendment issues, even with Soldal v. Cook County, supra, although that case was called to its attention in timely fashion.

By application of its own Court Rule 36.1, without de novo review, the Eleventh Circuit also

denied consideration to issues deemed worthy of review by the trial judge. He resolved challenges to a local law made on grounds that it is unconstitutionally overbroad on its face, and impermissibly vague. The law already had been applied to punish a weekly newspaper publisher who did not see "eye-to-eye" with the ways and means advocated by the former mayor in a rival publication to curb "eyesores" in the black community.

By dismissing this case as having no precedential value without affirming the memorandum opinion of the trial judge, the Eleventh Circuit has negated the need for the kinds of analyses, set forth in U.S. Supreme Court rulings to assess e.g. whether: (a) a state or local practice violates 42 U.S.C. § 1982, Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 20 L.Ed. 2d 1189 (1968) and Memphis v. Greene, 451 U.S. 100 (1981); (b) a newspaper's interests may outweigh the State's;

Branzburg v. Hayes, 408 U.S. 665 (1972); and (c) the challenged law is unconstitutional on its face or as applied, if at all, Hoffman Estates v. Flipside, Hoffman Estates Inc., 455 U.S. 489 (1982); Broadrick v. Oklahoma, 413 U.S. 601 (1973) All the aforementioned cases were cited and explained by the trial judge who applied them, albeit erroneously, to the facts in an unpublished memorandum opinion provided here in the appendix.

But the Eleventh Circuit has declined to stand by his reasoning, as it could have done with simple affirmance. So the same confusion remains about the validity of the city's Lot Cleaning Code, which was evident before this case was initiated.

When legal understanding of state or local law similarly affecting First Amendment rights was derailed in the Seventh Circuit, this Court remanded the substantial constitutional issues for appellate review de novo, in light of its own recent decision in City of Cincinnati v. Discovery Network, 61 U.S.L.W. 4272 (March 23, 1993).

On April 6, Pearson v. Edgar, #91-1855 (S.Ct. 1992) was remanded. The Pearson questions are presented at 61 U.S.L.W. 3004 (July 7, 1992).

In Pearson, petitioners complained that an Illinois state law to inhibit racial blockbusting was unconstitutionally vague. The law criminalized solicitation by real estate professionals of residents to sell their homes. The real estaters also claimed the law inhibited legitimate business practices without due process. The Seventh Circuit rejected the claims without reaching the merits on the basis of precedent upholding that law.

On its face, the Illinois Pearson issues would seem to be unrelated to the City of Cincinnati ordinance determined to be unconstitutional in the Discovery Network case from Ohio. In the latter, the municipality argued that a ban it had on comparatively few newsracks dispensing "commercial handbills" was justified on the basis of its legitimate interests in safety and esthetics.

But what Pearson, Discovery Network, and this matter all have in common is apparent disregard of constitutionally protected rights of expression when the state or locality goes about enacting laws for an admittedly worthy purpose. Pearson involves speech deemed unworthy because of potentially resulting harm to societal values.

The City of Cincinnati questioned whether commerical handbills even were newspapers entitled to any First Amendment protection. Likewise here, petitioner James Macon and his Florida Sun weekly have been denigrated throughout the described actions by and against Orlando.

The municipality questioned whether the weekly had any standing at all in this case, whether the 70-+-year-old publication circulated to several thousand African-Americans could even claim to be a newspaper.

Though the trial judge said he did not have to reach that issue, he accepted that the City could validly ignore the effects the Orlando actions were

having on Sun publication as the city went about enforcing the LCC. The city even had removed a trailer with newspaper equipment from Macon premises where the weekly was published. The judge noted the vehicle was not identified clearly.

In Discovery Network, the Court majority wrote that it was the municipality which had the burden of deciding if and how it could interfere with distribution of a publication it deems not to be a "newspaper"--"the responsibility for distinguishing between the two carries with it the potential for invidious discrimination of disfavored subjects. See also, Metromedia, Inc. v. San Diego, 453 U.S. 490, 536-537 (1981)(Brennan J. concurring in judgment)...," City of Cincinnati v. Discovery Network, 61 U.S.L.W., supra, at 4275, n. 19.

The trial judge below here accepted that the Florida Sun published news about a zoning controversy between Macon and Mable Butler, then city commissioner, and other information which

the City might have found objectionable. Certainly views differed, between the Sun publisher and the mayor who expressed in a rival weekly his distaste about "eyesores" in the black community.

The Discovery Network footnote again is applicable, this time by citation to Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988). "The ordinance at issue in Lakewood vested in the mayor authority to grant or deny a newspaper's application for a newsrack but contained no explicit limit on the scope of the mayor's discretion. The Court struck down the ordinance, reasoning that a licensing scheme that vests such unbridled discretion in a government official may result in either content or viewpoint censorship, Id., at 757, 769-770," noted with approval in City of Cincinnati v. Discovery Network, supra, at n. 19.

Here, it is apparent that the mayor argued his viewpoint about "eyesores" in a rival publication and then the City let Macon and his Sun know

in no uncertain terms that the publisher could and would be punished, after assertion of his own real property rights, by: (1) enforcement of its Lot Cleaning Code with mandatory fine, (2) a warrantless intrusion by private contractors accompanied by police on a Good Friday at the homestead where the weekly was prepared, and (3) discretionary city council appellate review led by the mayor assisted by a council commissioner with whom there was a published zoning dispute.

Certainly, the city interest in attempting to preserve or improve the quality of urban life is one that must be accorded the highest respect, Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984). But here, did Orlando also carry away First and Fourth Amendment rights of a weekly targeted to a very local audience in the black quarter of Orlando, when the city enacted and enforced the LCC?

Did the city rely on a law that was so vague, that a private owner's use of his own property in the black neighborhood could be trampled by a single city inspector concerned about prohibiting, as public nuisances, items she regarded as "adversely affect(ing) and impair(ing) the economic welfare of adjacent property?"

Among the items the judge noted the inspector wanted to have removed or repositioned or covered at the tenant's property, the homestead or both, were: "a boat uncovered, machinery in the yard, a trailer in the front yard...appliances (said to be improperly stored), auto parts, building materials, furniture, and tire/rims."

The trial court concluded that the challenged LCC clearly prohibited a person from allowing the accumulation of such items on residential curtilage. But in enumerating the bases for such prohibition, the judge artfully omitted the one severable concept in the full text of his

opinion, which has been challenged as overbroad and vague--an alleged ordered "duty of a property owner" to maintain lots, tracts or parcels of land, so that "household furnishings, and all other objectionable, unsightly...matter" do not "adversely affect...and impair...the economic welfare of adjacent property," The quotes are from severable (sic) provisions of LCC §§28.15 and 28.16.

The legitimate purposes of a community to maintain its health, safety, welfare, even its esthetics, cannot be extended broadly to require property owners who may be black, poor, eccentric, and/or rigidly principled, to protect the economic welfare of adjacent land of neighbors. Such purposes further become suspect when a local mayor targets black readers to urge them to protect their own property values by snooping into what their neigbors are doing, so that the city can enforce the lot cleaning code in their favor, cf. Papchristou v. City of Jacksonville, 405 U.S. 156 (1972).

The trial judge rejected these arguments, although he opined separately in his written denial of defense counsel's Rule 11 motion that "the fourth amendment claim, as well as the claims of vagueness and overbreadth, was potentially valid." Unfortunately, like the Seventh Circuit which denied full consideration to the substance of assertions of unconstitutional vagueness of a state law in Pearson v. Edgar, supra, the Eleventh Circuit in this case chose not to consider de novo the constitutionality of Orlando's lot cleaning code on its face or as applied.

Instead, the Eleventh Circuit erroneously dispensed not only with the claims and defenses of the parties, but, unless reversed, that court also negated any future meaning or application for the extensive, unreported memorandum opinion of the trial judge, by its local rule application.

As noted infra, the Eleventh Circuit has recognized that de novo review is required under

the circumstances which brought these matters to its attention in the first place. But pressing caseload problems may have persuaded that court to balance its own needs for expediency with the due process rights of the parties, K. L. Allen and W. M. Droze, "Applicable Practice and Procedure," Annual Eleventh Circuit Case Review, 42 Mercer L. Rev. 1255 (Summer, 1991); M. Killian, "(11th Cir. Ct. Chief Judge Gerald) Tjoflat: Courts overloaded...," The Florida Bar News, July 15, 1992.

However, prior decisional law suggests various federal circuits recognize that such de novo appellate review is required, when substantial federal questions are presented about the constitutionality of state and local laws, especailly in their application to the parties.

Below the City's attorney cited authority in support of those propositions. He briefed in his presentation of the applicable standards of review

by the federal circuit the need for de novo review for appellate assessment of constitutional challenge to purported vagueness of a law on its face, i.e., here to the LCC, when the challenge either involved a question of law, United States v. Clark, 912 F.2d 1087 (9th Cir. 1990), or the law's application, Western Nuclear, Inc. v. Huffman, 825 F.2d 1430, 1437 (10th Cir. 1987), rev. on other grounds, 100 L.Ed.2d 693 (1988); and Allis-Chalmers Credit Corp. v. Tri-State Equipment Companies, 792 F.2d 967, 970 (10th Cir. 1986).

In U.S. v. Hatch, 931 F.2d 1478, 1480 (11th Cir. 1991), cert. den. 112 S.Ct. 235, the Eleventh Circuit itself seemed to rule that de novo review was required when there is an application of law to facts to determine in a Fourth Amendment case both the meaning of curtilage and whether in particular circumstances it is "within the realm of legitimate privacy expectations," id..

In this case, the Eleventh Circuit granted oral argument, but then neither explained, affirmed, nor denied the unpublished memorandum opinion below. Instead, that appellate court relied on its local circuit court rule 36.1 to accept only the lower court's judgment. The appellate court, without its own published opinion, dispensed with the case as having no precedential value. Nothing it did thus could be interpreted explicitly or implicitly to demonstrate de novo review.

That local appellate rule created after the Eleventh Circuit came into being in 1981 is regarded as unique. The rule has been criticized for being applied subjectively, primarily to dispense with civil cases summarily, L. K. Robel, "Caseload and Judging: Judicial Adaptations to Caseload," 1990 Brigham Young U. L. Rev. 3, 54, n. 211, citing Songer, Smith & Sheehan, "Non-publication in the Eleventh Circuit: An Empirical Analysis," 16 Fla. St. U. L. Rev. 963, 980-89 (1989).

The latter analysis of 1,000 Eleventh Circuit rulings concluded that civil right plaintiffs and others referred to as underdogs also were disadvantaged by idiosyncratic applications of the rule.

Neither of those law review writings specifically reaches the far-more critical matters raised in this case, i.e., the application of the criticized rule and the assertion of lack of precedential value in a civil action entitled by judicial decision to be given de novo review, especially when there is an undeniably substantial federal constitutional challenge to the vagueness or overbreadth of a state or local law said to be chilling free expression of ideas and inhibiting use of one's own real property without due process.

A simple affirmance of the lower court rulings would have allowed petitioners to squarely petition for reversal of a vague and overbroad ordinance (1) inhibiting First Amendment applications and (2) permitting enforcement by warrantless

intrusion and removal onto curtilage. But the appellate court's application of its own local rule affirming only the judgment and negating precedent has a potentially more far reaching effect, if this Court declines to review those actions.

If this petition is denied, if this Court does not reverse or vacate the Eleventh Circuit result, to assure appellate review de novo of the constitutional issues raised by the petitioners, the temptation will be great in a time of great case load stress simply to dispense with meaningful appeal in civil cases heretofore requiring the highest standard of review. Constitutional rights of parties might disappear, or be rendered unnecessarily uncertain, until a federal circuit found other cases in which the questions could be resolved with less potential for conflicts already perceived by judges as interfering with caseload expediency.

This Court should exercise its power of supervision, to assure that constitutional rights don't disappear, in any federal circuit, even temporarily, until an appellate court finds a case deemed more suitable to resolve complex constitutional issues.

CONCLUSION

For the above reasons, certiorari should be granted, and lower court decisions reversed. The Eleventh Circuit application of its local rule to an affirm judgment but not the supportive reasoning should be set aside and the matter remanded for de novo appellate review of the substantive constitutional claims, partiucularly those arising under the First and Fourth Amendments.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-3740

JAMES MACON, FLORIDA SUN, GLADY MACON

Plaintiffs-Appellants,
versus

DONMORITA EATON (sic, an error--in fact, the Defendants-Appellees were the CITY OF ORLANDO, BILL FREDERICK, then mayor, MABLE BUTLER)

Defendants-Appellees.

On appeal from the United States District Court
for the Middle District of Florida

ORDER:

( ) The motion of Appellants, for ( ) stay ( ) recall and stay issuance of the mandate pending petition for writ of certiorari is DENIED.

(x) The motion of Appellants, for (x) stay ( ) recall and stay of the mandate pending petition for writ of certiorari is GRANTED to and including

11 March 1993, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

Appellants' motion for leave to (strike) appellees' response in opposition to motion for stay of mandate is DENIED.

(s) J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

(STAMPED AS HAVING BEEN FILED FOR THE U.S. COURT OF APPEALS BY MIGUEL J. CORTEZ, CLERK, on March 3, 1993, on top of the page, here, 1a.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-3740

JAMES MACON, FLORIDA SUN, GLADY MACON
Plaintiffs-Appellants,
versus

CITY OF ORLANDO, BILL FREDERICK, mayor, MABLE BUTLER
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, EDMONDSON, Circuit Judge, and MORGAN, Senior Circuit Judge.
PER CURIAM:
(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellant Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

(s) J. L. Edmondson

UNITED STATES CIRCUIT JUDGE

(STAMPED AS HAVING BEEN FILED FOR THE U.S. COURT OF APPEALS BY MIGUEL J. CORTEZ, CLERK, on DEC 11, 1992, on top of the page, here, 3a.)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-3740

D. C. Docket No. 89-327-CIV-ORL-19

JAMES MACON, FLORIDA SUN, GLADY MACON
Plaintiffs-Appellants,
versus

CITY OF ORLANDO, BILL FREDERICK, mayor,
MABLE BUTLER
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

(July 10, 1992)

Before: TJOFLAT, Chief Judge, EDMONDSON, Circuit Judge, and MORGAN, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See 11TH Cir. R. 36-1.

(STAMPED AS HAVING BEEN FILED FOR THE U.S. COURT OF APPEALS BY MIGUEL J. CORTEZ, CLERK, on JUL 10, 1992, on top of the page, here 5a.)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

D. C. Docket No. 89-327-CIV-ORL-19

JAMES MACON, The Florida Sun, and Gladys Macon

versus

CITY OF ORLANDO, FLORIDA, its Mayor Bill Frederick, and City Commissioner Mable Butler, in their official capacities,

ORDER

The defendant (sic) has moved this court for sanctions against the plaintiffs. Although the plaintiffs' claims were not meritorious in the end, the fourth amendment claim, as well as the claims of vagueness and overbreadth, was potentially valid. Thus, defendant's (sic) motion for sanctions is denied.

(s) *L. Clure Morton*
L. CLURE MORTON
SENIOR U.S. DISTRICT JUDGE
FOR THE MIDDLE DISTRICT
OF TENNESSEE, SITTING BY
ASSIGNMENT IN THE MIDDLE
DISTRICT OF FLORIDA

FILED 91 AUG 16

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

D. C. Docket No. 89-327-CIV-ORL-19

JAMES MACON, The Florida Sun, and Gladys Macon
versus
CITY OF ORLANDO, FLORIDA, its Mayor Bill Frederick, and City Commissioner Mable Butler, in their official capacities,

JUDGMENT IN A CIVIL CASE

[__] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
[xx] **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the defendants and against the plaintiffs.

July 1, 1991
Date

David L. Edwards
Clerk
(s) Cindy Burgess
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

D. C. Docket No. 89-327-CIV-ORL-19

JAMES MACON, The Florida Sun, and Gladys Macon
versus
CITY OF ORLANDO, FLORIDA, its Mayor Bill Frederick, and City Commissioner Mable Butler, in their official capacities.

MEMORANDUM

This case involves the constitutionality, facially and as applied, of various provisions of Orlando's Lot Cleaning Code (LCC). The plaintiffs are James Macon, Gladys Macon, and the Florida Sun. Mr. and Mrs. Macon[1] (the Macons) are husband and wife. The Florida Sun is a weekly newspaper owned and run by Mr. Macon at all times relevant to

1--Gladys Macon was made a party plaintiff pursuant to a court order requiring her joinder.

this action. The defendants are the City of Orlando, Mayor Bill Frederick, and former City Commissioner Mable Butler (Commissioner Butler). Mayor Frederick and Commissioner Butler are sued in their official capacities only.

A two-day trial was held on this matter without a jury. At the conclusion of the case, this court gave the parties forty-five days to file proposed findings of fact and conclusions of law. The pertinent sections of Orlando's LCC are as follows:[2]

2--The plaintiffs entered two copies of the LCC into evidence. Having reviewed both exhibits, the court does not find any differences in the contested sections. In fact, the pages containing the relevant sections, 28.15 - 28.18 & 28.20, appear to be exact duplicates of one another. It is unclear why both exhibits were entered other than the fact that exhibit 99 is a certified copy of the relevant sections of the ordinance as it was in force as of January 15, 1991.

ARTICLE II. WEEDS, DEBRIS, RUBBISH AND HAZARDOUS TREES.

Sec. 28.15. Prohibited as public nuisances.

The existence of execssive accumulation or untended growth of weeds, undergrowth, or other dead or living plant life; or stagnant water, rubbish, debris, trash, including but not limited to household furnishings, and all other objectionable, unsightly or unsanitary matter upon any lot, tract or parcel of land within this City be it uncovered or under open shelter, to the extent and in the manner that such lot, tract or parcel of land is or may reasonably become infested or inhabited by rodents, vermin or wild animals, or may furnish a breeding place for mosquitoes, or threatens or endangers the public health, safety or welfare, or may reasonably cause disease, or adversely affects and impairs the economic welfare of adjacent property, is hereby prohibited and declared to be a public nuisance and unlawful unless neatly arranged for removal in accordance with directions of the Department of Planning and Development.

Sec. 28.16. Duty of property owners generally.

It shall be the duty of the owner of each lot, tract, or parcel of land within the City to reasonably regulate and effectively control excessive

growths and accumulations, as enumerated in Section 28.15, on the property and on the portion of the adjoining public right-of-way between the property and the street. It shall also be the duty of the owner to drain, regrade or fill any lot, tract, or parcel, including swimming pools thereon, which shall be unwholesome or unsanitary, have stagnant water thereon, or be in such other condition as to be susceptible to producing disease.

(a) If the Director of Planning and Development or his designee finds and determines that a public nuisance as described and declared in Sections 28.15 and 28.16 hereof exists, he shall so notify the record owner of the offending property and demand that such owner cause the condition to be remedied. The notice shall be given by both physical posting on the property in the name of the property owner and by certified mail or personal delivery to the owner or owners as their names and addresses are shown upon the records of the Orange County Tax Assessor. Notice shall be deemed complete and sufficient when so physically posted and personally delivered or mailed.

(b) The notice required by subsection (a) shall contain the following:

1. Name(s) and address(es) of the owner(s) of the property, according to the public records of Orange County, Florida.

2. Location of the property on which the violation exists.

3. A statement by the code inspector that the property has been inspected pursuant to chapter 28 and that a violation of Sections 28.15 and 28.16 has been determined to exist on the property, which violation constitutes a public nuisance.

4. A description of the condition which causes the property to be in violation.

5. A requirement that the record owner of the property remedy the violation within fifteen (15) days from the date of notice, failing which the City will remedy the condition and assess against the record owner the costs thereof plus an administrative charge.

6. A statement that, if the costs and administrative charge are not paid within thirty (30) days of invoice date, a lien will be placed on the property which is enforceable by foreclosure on the property.

7. A schedule of the charges which may be assessed against the record owner if the City has to remedy the violation.

8. An estimate of the total cost, based on the schedule of charges, if the violation is remedied by the City. Such estimate is not to be interpreted or construed as the final cost which may be assessed, but only as a good-faith approximation of such cost. The final assessable cost may be greater or lesser than the estimate.
9. A statement that the record owner of the property may, within fifteen (15) days from the date of the notice, submit a written appeal, from the determination of a public nuisance, which must contain all reasons, evidence and argument that the cited condition does not constitute a violation.

(c) Within fifteen (15) days from the date of the notice, the owner of the property may appeal the determination of nuisance by submitting a written appeal to show that the condition does not constitute a public nuisance. Such appeal shall be addressed to the City Clerk and shall state the name of the property owner, the location of the cited property, and the specific grounds upon which the owner relies in order to show that the cited condition does not constitute a public nuisance.

Sec. 28.18 Removal by the City.

(a) If after fifteen (15) days from the date of the notice no written appeal has been filed and the condition described in the notice has not been

remedied, the Director of Planning and Development or his designee shall cause the condition to remedied by the City at the expense of the property owner. If a written appeal has been filed and the finding of public nuisance is upheld, the Director of Planning and Development or his designee may cause the condition to be remedied by the City at the expense of the property owner unless the City Council otherwise directs.

(b) If a written appeal has been filed and the finding of public nuisance is reversed, the City will not assess any costs or administrative penalties against the property, although such administrative penalties would otherwise by [judge's sic] authorized by Section 28.20 of this Code.

(c) In cases involving major nuisance conditions requiring immediate, direct action to abate hazards imminently dangerous to the health, welfare or safety of the public, the City may upon Planning and Development Director or Bureau Chief of Code Enforcement authorization, cause the conditions to be immediately remedied by City-authorized lot cleaning. Notice of said lot cleaning shall be given within five (5) days after the lot cleaning and according to the procedures detailed in Section 28.17 above, except that the notice shall explain that the property contained

hazards requiring immediate remedy, that the lot has already been cleaned, and that the property owner has fifteen (15) days from the date of the notice to apply to City Council to show why costs of cleaning should not be assessed against his property. Said emergency lot cleaning shall be at the expense of the property owner; however, the property owner may make a written request for a hearing before City Council as above provided within fifteen (15) days from the date of notice that his lot had to be cleaned and that a charge is being assessed therefore.

Sec. 28.19. Collection of costs and records; secured property.

After causing the condition to be remedied, the Director of Planning and Development shall certify to the Director of Finance the expense incurred in remedying the condition whereupon such expense, plus a charge to cover City administrative expenses, plus any administrative penalty as provided in Section 28.20, shall become payable within thirty (30) days, after which a special assessment lien and charge will be made upon the property, which shall be payable with interest at the rate of eight percent (8%) per annum from the date of such certification until paid.

Such lien shall be enforceable in the same manner as a tax lien in favor of the City of Orlando and may be satisfied at any time by payment thereof including accrued interest. Notice of such lien may be filed in the office of the Clerk of the Circuit Court and recorded among the public records of Orange County, Florida.

If the subject property is secured by locks or otherwise, the City shall have the authority to enter said property for purposes of remedying the violative condition, and any additional costs incurred by the City in gaining access to the property or in resecuring the property after cleaning shall be considered expenses of remedying the condition.

Sec. 28.20. Administrative charge; administrative penalty.

(a) In addition to the actual cost of remedying the violation cited under Sections 28.15 and 28.16, the City may also assess a charge to cover administrative expenses incurred in securing and monitoring the services of a private contractor to remedy the violation. Said administrative charge shall be reviewed and approved by City Council at least on an annual basis.

(b) If a second violation of Sections 28.15 and 28.16 is cited against the same property and property owner within twelve (12) months from the date of the first citation, an administrative penalty of one hundred dollars ($100.00) shall additionally be assessed five (5) days after the second citation. If the condition is abated by the owner during that five (5) day period, the penalty will not be assessed. If a third violation of Sections 28.15 and 28.16 is cited against the same property and property owner within twelve (12) months from the date of the first citation, an administrative penalty of two hundred dollars ($200.00) shall additionally be assessed five (5) days after the third citation. If the condition is abated by the owner during that five (5) day period, the penalty will not be assessed. Subsequent violations cited against the same property and property owner shall be referred to the City's Office of Legal Affairs for appropriate legal action including, but not limited to, injunctive relief, in addition to enforcement as provided in this Chapter.

The plaintiffs challenge sections 28.15, 28.16, 28.17, 28.18, and 28.20. They claim that either facially or as applied these sections were unconstitutional because of vagueness and over-

breadth, failure to provide substantive and procedural due process, discrimination due to race, chilling of first amendment rights, failure to provide equal protection of the laws, and causing unreasonable searches.

The defendants deny all of the allegations. They also move the court to dismiss with prejudice all claims by The Florida Sun for lack of capacity to sue. The defendants also assert that the plaintiffs' attack of the LCC must fail because the proper version of the LCC was never entered into evidence. The court makes the following findings of fact:

In order to enforce the LCC, the City of Orlando employs three Lot Cleaning Code inspectors. Each inspector is responsible for an area consisting of two city councilmanic districts. The Macons resided at 1115 Henton Lane and owned rental property located at 826 Bethune Drive. Oscar Beachum was the tenant living at Bethune during the relevant time period. These two properties were

in the LCC area assigned to Larraine Danzy-Hamilton (Inspector Hamilton)[3] for inspection. The residents of this area are predominantly black and most black citizens live in Hamilton's assigned area.[4]

Prior to becoming a LCC inspector, Hamilton had been a "cruiser." As a cruiser, she drove throughout the entire city looking for violations of the LCC. Inspector Hamilton was trained for this position by riding with a housing inspector who

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3--It appears that Inspector Hamilton has married since her initial involvement in this action. As a result, she has been identified in briefs and at trial as: Larraine Danzy-Hamilton, Larraine Danzy, and Larraine Hamilton.

4--Thirty percent of the City's population is black and most black citizens live in Hamilton's assigned area.

briefed her as to what was considered a violation of the LCC.[5]

As a cruiser, she was not authorized to cite a property for being in violation of the LCC. Instead, upon finding a potential violation, she would notify an inspector. The inspector would then check the property and, after checking, would inform Hamilton as to whether or not the property had been in violation of the LCC. Hamilton became a cruiser in 1987.

After becoming an LCC inspector, Hamilton had the authority to write citations for violations of the LCC. As an inspector she was required to

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5--At the time, housing inspectors were responsible for enforcing the LCC in addition to their other duties. LCC inspectors evolved from the cruiser positions.

drive by all the properties in her assigned area and look for potential violations of the LCC. It usually took her about four to six months to drive by all the properties. She was also given authority to inspect yards by physically going onto the property, although this was not done unless potential LCC violations were seen by her as she drove by the property, or complaints concerning the property had been made.[6] If Inspector Hamilton was unsure

6--Generally, LCC inspections were prompted in one of the following ways: (1) The different city departments routinely referred potential violations they had seen or heard about to the correct department. (2) Citizens made complaints directly to the LCC department. (3) The LCC inspector saw a potential violation while patrolling her assigned area.

whether something was a violation, she called her supervisor for advice.If a property is cited, a large notice of the citation is placed in the yard at the time of citation. Next, a certified letter is mailed promptly to the property owner's address. This letter contains a copy of the citation information, consequence of failure to clean up or otherwise take care of the cited violations, and the procedure for appeal.[7]

If the violations are not corrected a "last reminder" letter is sent to the property owner approximately ten days from the citation date. These procedures were followed when the Macons' properties were cited.

7--The certified letter and the notice placed in the yard basically contained the same information.

During the course of her job, Inspector Hamilton found violations of the LCC at the Macons' Bethune and Henton properties. On June 27, 1988, Inspector Hamilton cited the Bethune Drive property for numerous violations of the LCC. This inspection was prompted by complaints concerning Mr. Beachum's residence made to Commissioner Butler who was the City Commissioner for the district wherein the Bethune Drive property was located. The complaints were made by Mr. Beachum's neighbors, Verna Mann and Allen Cason. Commissioner Butler referred the matter to the LCC department as was her habit for such complaints. At the time Butler referred the matter to the LCC department, she did not know that the Macons owned the property. Generally, about one referral a month came to the LCC department from City Hall.The property was cited by Inspector Hamilton for the following violations: Plant overgrowth, scattered logs/limbs, scattered

trash and rubble, leaving a boat uncovered, machinery in the yard, a trailer in the front yard, and improper storage of applciances, auto parts, building materials, furniture, and tires/rims.

A notice of the citation was placed in the yard of the cited property on June 27 or 28, 1988, and a certified letter, as mentioned supra, was mailed to the Macons at 1115 Henton Lane, Orlando Florida, 32805 on June 28, 1988. The Macons were thereby informed that they had fifteen days to remedy the violations, and that if they failed to do so, the City would remedy the problems and charge the cost thereof to them. The citation also informed them of the estimated cost of city cleanup. The Macons were informed of their right to appeal and the procedure to sue for appeal.

The notice and letter also stated the following:

(") Section 28.20 Administrative Charges; Administrative Penalty:....(b) If a second violation of sections 28.15 and 28.16 is cited against the same property owner within twelve (12) months from the date of the first citation, an administrative penalty of one hundred dollars ($100.00) shall additionally be assessed at the time of the second citation....

On February 20, 1989, Inspector Hamilton cited the Henton Lane property for violations of the Lot Cleaning Code. This inspection was prompted by a referral from the City Zoning Department. The violations included plant overgrowth, trash in a trailer and the following items in the yard: log/limbs, scattered litter, applicances, auto parts, tires/rims, furniture, and building materials. Notice of the citation was placed in the yard and also mailed to the Macons on February 13, 1989 at their Henton Lane address.

These documents contained the same information as to the consequences, appeals, etc., as the ones previously discussed in relation to the June 1988 citation at Bethune. On February 20, 1989, a "last reminder letter" was sent to the Macons.

While on routine driving patrol, Inspector Hamilton noticed potential LCC violations at 826 Bethune Drive. After inspecting the property, including the back yard, she cited the property on February 17, 1989. She went into the backyard because of the past violations in that part of the property.[8] In general, the violations were of the

8--Inspector Hamilton testified that when she went by the property on Bethune Drive during her routine surveillance, she never stopped to inspect the backyard if the front yard looked all right.

same type as those cited in June 1988. The certified letter containing all the relevant information concerning the citation, consequences and appeals was sent on February 20, 1989, to the Macons at the Henton Lane address.

On February 22, 1989, an invoice was sent to Mr. Macon at 1115 Henton Lane informing him that the property at 826 Bethune Drive had been cited twice within a twelve-month period. Thus, pursuant to section 28.20 of the LCC, the property was being assessed a $100 administrative penalty to be paid by March 21, 1989.

Mr. Macon appealed the implementation of the $100 penalty for having two LCC violations within twelve months at Bethune. He was told to come to the next city council meeting for a hearing on the matter. On March 24, 1989, before the hearing occurred, the City cleaned the Henton Lane property over Mr. Macon's objections. Mr. Macon ordered Inspector Hamilton and the cleanup

crew of his property and told Hamilton that he had an appeal hearing set. Inspector Hamilton called her supervisor who told her to proceed with the cleanup. The supervisor sent a police escort to watch over the cleanup. The Macons were charged $509.00 for this cleanup. The estimated cost of cleanup as contained in the citation was $600.00.

The appeal hearing was held March 27, 1989. Such hearings are conducted before all six of the council members and the mayor. Mr. Macon's appeal was denied and the $100 penalty upheld by voice vote.

On April 27, 1990, Inspector Hamilton was driving through the Henton Lane neighborhood on routine patrol. She noticed potential LCC violations on the Macons' property. After inspecting 1115 Henton Lane, Inspector Hamilton cited the property for violations of the LCC. The violations were similar to the previous violations at Henton except that no plant overgrowth or logs/limbs

were listed as violations. A letter containing the relevant information was sent to the Macons at the Henton Lane address on April 30, 1990. The Henton property was reinspected on May 16, 1990 and found to be in compliance with the LCC.

The above findings of fact will be supplemented as necessary as the plaintiffs' allegations are discussed.

The LCC ordinance submitted at trial was enacted in December, 1989, except for section 28.14 which was enacted in July 1989. Thus all of the citations except for the one in April 1990 occurred prior to the submitted ordinance. Where this affects the court's decision, it will be addressed.

The plaintiffs claim that the defendants violated 42 U.S.C. § 1982 and their fourteenth amendment right to equal protection of the law. Section 1982 states:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. 42 U.S.C.§1982 (1981).

This "section forbids both official and private racially discriminatory interference with property rights." Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 616, 95 L. Ed 2d 594, 597 (1987); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 20 L. Ed. 2d 1189 (1968). "To effectuate the remedial purposes of the statute, the [Supreme] Court has broadly construed this language to protect not merely the enforceability of property interests acquired by black citizens but also their right to acquire and use property on an equal basis with white citizens." Memphis v. Greene, 451 U. S. 100, 120, 67 L. Ed. 2d 769, 786 (1981).

In order to prevail in an action under 42 U.S.C. § 1982, the plaintiffs must prove that the defendants were motivated by racial animus-aimed towards a group protected under the statute. Shaare Tefila Congregation, 481 U.S. at 617, 95 L. Ed. 2d at 597; Irizarry v. Palm Springs General Hosp., 657 F. Supp. 739 (S. D. Fla. 1986) (plaintiff must prove that discrimination was based on an impermissible racial component); See also General Building Contractors Asso. v. Pennsylvania, 458 U.S. 375, 73 L. Ed. 2d 835 (1982) (42 U.S.C. § 1981, the companion section to section 1982, can be violated only by purposeful discrimination).

Mr. and Mrs. Macon are black. The court also notes that Mrs. Macon, Mr. Cason, Mr. Beachum, Inspector Hamilton, and Commissioner Butler are also black. The Macons assert that they were discriminated against in their use and ownership of their property because of their race in violation of section 1982. The court finds that Inspector Hamilton does not consider race or color when ma-

king inspections, nor does it matter to her if the neighborhood is predominately (sic) black. The Macons' properties were checked in the same manner as the other properties within her area. The enforcement procedures used were the same as those used throughout the City and the LCC is not enforced differently against black citizens.

As evidence of discriminatory intent, the Macons state that the $100 fine that Mr. Macon appealed had been reduced for white property owners but was not reduced in his case. However, the plaintiffs failed to show that their circumstances were similar to the circumstances of those who received reductions in fines. INnfact, very little evidence was produced concerning the particular circumstances of the fine reductions.

The plaintiffs also argue that the cleanup of the Henton Lane property provides evidence of discriminatory intent because it occurred on Good Friday. Once again, no proof was offered as to

whether or not other properties were cleaned by the City on Good Friday or other holidays.

The plaintiffs also point to the lack of significant citations in Commissioner Jeff Clark's district as evidence of discriminatory intent, but no evidence was produced as to whether the LCC was enforced differently in Clark's district.[9] The court finds that the LCC is facially neutral with regard to race and therefore not unconstitutional under section 1982. Based upon the above, the courty also finds that the plaintiffs failed to prove by a preponderance of the evidence that the defendants enforced the Code against the Macons

9--No evidence was produced concerning the application of the LCC in the other councilperson's districts. Thus, the court dos not know whether the LCC had a disparate impact, and, therefore, the plaintiffs are precluded from relying on disparate impact to show discriminatory purpose.

with the purpose of discriminating against them due to their race. Thus, the LCC was not applied in violation of section 1982.

Since the plaintiffs have failed to show that the defendants acted with a discriminatory purpose, their fourteenth amendment claim must also fail. Memphis v. Greene, 451 U.S. 100, 67 L. Ed. 2d 769 (1981) (absence of proof of discriminatory intent forecloses any claim that the official action challenged in the case violates the equal protection clause of the fourteenth amendment); Washington v. Davis, 426 U.S. 229, 48 L. Ed. 2d 597 (1976) (proof of discriminatory racial purpose is necessary to show a violation of the equal protection clause); Arlington Heights v. Metro Housing Dev. Corp., 429 U.S. 252, 50 L. Ed. 2d 450 (1977).

The plaintiffs also allege that the defendants violated their first amendment right of free speech and/or press.

The Supreme Court has stated that:

> It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that "[t]he publisher of a newspaper has no special immunity from the application of general laws. . . ."

Branzburg v. Hayes, 408 U.S. 665, 682-683, 33 L. Ed. 2d 626, 640 (1972) (quoting from Associated Press v. NLRB, 301 U.S. 103, 81 L. Ed. 953 (1937).

This court finds that the LCC is a law of general applicability that serves the substantial public interest of health, safety, and welfare. Thus the first amendment does not act to invalidate the LCC on its face due to any incidental burden that its enforcement may place on plaintiffs' first amendment rights.

The plaintiffs also allege that the defendants used the LCC to harass them in order to chill publication of the Florida Sun. In support of this contention, Mr. Macon testifed that the City had cited and towed a trailer from his Henton Lane property in 1986. The trailer had contained equipment used to publish the newspaper. However, it is unclear whether the trailer was towed pursuant to the LCC or one of the other city codes. Regardless, Mr Macon did not ask if he could remove items from the trailer before it was towed nor did he tell the City that there were items in the trailer that he needed for his newspaper. The trailer itself had no identification on it signifying its use for the Florida Sun.

Mr. Macon also testified that stacks of newspapers were sometimes kept at Henton Lane for a few days, usually on the stoop on in a car, and that one of the reasons he was cited was because of these stacks. However, Inspector Ham-

ilton stated that no violation of the LCC occurred from newspapers stacked at Henton Lane.

As proof of a motive for the defendants, Mr. Macon testified that the Florida Sun had published articles concerning racism and litigation taking place against the City. He also testified that he and Commissioner Butler had opposing views concerning a zoning dispute and that the zoning dispute was published in his newspaper.

The plaintiffs have failed to carry their burden of proof as to the first amendment issue. There was little or no evidence that the LCC was enforced against the Macons in a manner differently from others similarly situated. In fact, the evidence submitted shows that the defendants did not consider Mr. Macon's occupation when applying the LCC to his properties. The court finds that the defendants did not use the LCC to chill the publication of the Florida Sun.

The court finds that there was little proof offered concerning any fourth amendment privacy interest at the Henton property and therefore no search in violation of the fourth amendment occurred. However, there was evidence presented as to this issue concerning the Bethune property, specifically the backyard of the property.

In order to determine whether a search in violation of the fourth amendment occurred, this court is guided by Katz v. United States, 389 U.S. 347, 19 L. Ed. 2d 576 (1967).

> Katz . . . provides guidance in defining the scope of the interest protected by the Fourth Amendment . . . . [T]he Court . . . held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.

Rakas v. Illinois, 439 U.S. 128, 143, 58 L. Ed. 2d 387, 401 (1978); See also United States v. Jackson, 588 F.2d 1046 (5th Cir. 1979).

> The plain view doctrine defines certain sensory observations as being outside the scope of the Fourth Amendment's protections. This doctrine is entirely consistent with the Katz expectations standard since an individual can have no justifiable expectation of privacy as to activities he exposes to the plain view of others.

Jackson, 588 F. 2d at 1052.

This court finds that the plaintiffs had no reasonable expectation of privacy in the Bethune property in question. Mrs. Mann was the next door neighbor of Mr. Beachum. She was able to see into the backyard at 826 Bethune from her property at all times of the year. Furthermore, she did not need to go up to the property line in order to see

Beachum's yard and the items therein. She could stand back in her yard and look at his yard. Mrs. Mann also invited members of the Greater Orlando Neighborhood onto her property and showed them the conditions she was complaining about.[10]

Thus, the Bethune Drive property was in the plain view of others and the plaintiffs could have no reasonable expectation of privacy concerning it. Therefore, Inspector Hamilton's inspection did not violate the proscriptions of the Fourth Amendment.[11]

10--Greater Orlando Neighborhoods acted as a liaison between the citizens of the City and the city government and its members acted to help city citizens access the city system.

11--Since the court has determined that the Bethune property was in the plain view of the public, it is not necessary to address defendants' argument that the Macons had no reasonable expectation of privacy interest in the yards at Bethune.

The plaintiffs have also raised substantive and procedural due process challenges. The court will first address the substantive due process claim.

> The substantive due process doctrine proscribes "deprivation of a property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational basis."

Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir. 1989) (citations omitted).

> The rational basis standard requires that the challenged legislation must have a legitimate public purpose and that the legislation must rationally relate to the end it seeks to achieve.

Grant v. County of Seminole, 817 F. 2d 731, 735 (11th Cir. 1987).

In determining that a city's decision with regard to a building permit did not violate substantive due process, the Eleventh Circuit stated:

> The City could rationally care that a structure that was only half-completed after five years presented a problem with rodents, transients, sand erosion, or vandals, injuring the surrounding neighborhood economically, environmentally, and aesthetically. Avoidance of such harms is a constitutionally permissible objective.

Spence, 873 F. 2d at 260.

The court finds that the City's LCC has a legitimate public purpose in protecting the public health, safety, and welfare, and preventing economic or aesthetic harm to the surrounding neighborhood. The court also finds that the legislature by prohibiting the accumulation of trash and excessive growth of weeds or untended plants rationally relates to the ends it seeks to achieve. The court does not find that the means were pretextual, arbitrary, or capricious, nor does

the court find an improper motive on the defendants' part.[12]

As previously stated, plaintiffs also raise a procedural due process claim.

> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case. . . ." We have described "the root requirement" of the Due Process CLause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest."

12--The plaintiffs also claim that the automatic imposition of the administrative penalty, as codified in the previous enactment not in evidence deprived them of due process. The plaintiffs argue that a grace period was necessary as is currently included in section 28.20. This claim must fail. First, the challenged enactment was not placed into evidence. Secondly, although the penalty was automatically imposed upon a finding of a second violation within twelve months, the penalty would be withdrawn if the citation causing the penalty was appealed and overturned.

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 503-504 (1985) (emphasis in ordinal & citations omitted); See also Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987).

It appears that plaintiffs specifically challenge the procedure involved in the cleanup at Henton Lane on March 24, 1989 and the appeal held on March 27, 1989.

The court finds that the plaintiffs received adequate notice and an opportunity for a hearing in all matters concerning the LCC. Although Mr. Macon testified that he was not sure whether the City had always placed a notice in his yard, he does not contest that he received timely notice of the citations by mail. The court finds that the plaintiffs failed to show that notice was not placed in the yards of the property. Regardless, the mailed notices provide the plaintiffs with adequate notice and told them of their right to appeal and the procedures involved.

Mr. Macon took advantage of the appeal process after the second violation at Bethune Drive within twelve months triggered the $100 fine provision of the LCC. He was given a hearing before an enforcement board composed of the city council members and the mayor. He was allowed to present evidence and was represented by council (sic). The members of the enforcement board voted unanimously to uphold the fine.

Plaintiffs contest the propriety of the Mayor's and Commissioner Butler's participation in the appeal. They argue that the Mayor should not have participated because of his support for the LCC. They argue that Commissioner Butler should not have participated because she referred complaints made to her concerning the Bethune Drive property to the LCC department. [A]n impartial decision maker is essential. . .

> [P]rior involvement in some aspects of a case will not necessarily bar a[n] . . . official from acting as a decision maker. He should not, however, have participated in making the determination under review.

Goldberg v. Kelly, 397 U.S. 254, 271, 25 L. Ed. 2d 287, 301 (1970) (citations omitted).

The court finds that neither the Mayor's nor Commissioner Butler's involvement was such that it negated their partiality and finds that they did not participate in the actual decision to cite the properties.

The plaintiffs also claim that their procedural due process rights were violated by the cleanup at Henton Lane. The court finds that the plaintiffs received proper notice concerning the violations and citation that led to the cleanup of

Henton Lane on March 27, 1989. Furthermore, the plaintiffs received notice of their right to appeal the citation. They were told of the consequence of failing to clean up the property on their own and received a "last reminder letter" concerning the property.

The plaintiffs argue that their procedural due process rights were violated because the cleanup of Henton occurred before the appeal hearing. However, the plaintiffs did not appeal the citation given at the Henton Lane address which would have acted to stop the cleanup. The court finds that no procedural due process violations occurred.

Plaintiffs also claim that the LCC is unconstitutional, facially and as applied, because of vagueness and overbreadth. In determining whether the LCC was applied so as to be unconstituitonal because of overbreadth or vagueness, the court will consider only the citation

given on April, 1990, as this was the only citation that occurred after the date of the enactment of the LCC placed into evidence.

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge. . . .

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-495, 71 L. Ed. 2d 362, 369 (1982) (footnotes omitted).

The Supreme Court in Broadrick v. Oklahoma, 413 U.S. 601, 37 L. Ed. 2d 830 (1973), provides guidance as to when a law may be considered overbroad:

> [T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset (attenuates [the court's] (sic)) as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" towards conduct and that conduct -- even if expressive -- falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect -- at best a prediction -- cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. . . . To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Broadrick, 413 U.S. at 615, 37 L. Ed. 2d at 842 (Ci-

(tations omitted); See also American Booksellers v. Webb, 919 F. 2d 1493, 1500 (11th Cir. 1990).

Although the overbreadth and vagueness doctrines are distinct from each other, the vagueness of an enactment must be considered when deciding the overbreadth issue. American Booksellers, 919 F.2d at 1505-1506 (the ambiguous scope as well as the unambiguous scope of an enactment must be considered since ambiguous meanings cause the pubic to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly delineated).

This court finds that the LCC primarily regulates conduct. The proscribed conduct is a proper and legitimate exercise of the police power reserved to the states. The court finds that the LCC is not substantially overbroad when judged in relation to its plainly legitimate sweep, and that any overbreadth problems that may arise should be dealt with on a case-by-case basis, and further-

more, the court finds that in the case at hand the LCC was not applied in a manner that could be considered overbroad. See Broadrick, 413 U.S. at 615, 37 L. Ed. 2d at 842; Bruno v. Garsaud, 594 F.2d 1062 (5th Cir. 1979) (In light of both the importance of state interests underlying the statute and numerous situations to which it might be validly applied, this is not an appropriate case to invalidate a statute in its entirety due to overbreadth on the behest of one whose conduct the statute constitutionally proscribes because the statute might unconstitutionally be applied to others).

> A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications.

Hoffman Estates, 455 U.S. at 497, 71 L. Ed. 2d at 371.

> A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.

Id. at 495, 71 L. Ed. 2d at 369 (footnotes omitted); Parker v. Levy, 417 U.S. 733, 756, 41 L. Ed. 2d 439, 458 (1974) (One to whose conduct a statute clearly applies may not successfully challenge it for vagueness).

> The standards for evaluating the vagueness of a statute or ordinance were enunciated in Grayned v City of Rockford, 408 U.S. 104, 108-109, . . . 33 L. Ed. 2d 222 (1972). First, a person must be given a reasonable opportunity to know what the law prohibits so that he may act accordingly. Id. Second, in order to prevent arbitrary and discriminatory enforcement, laws must provide explicit standards. Id.

DeSisto College, Inc. v. Howey-in-the-Hills, 706 F.

Supp. 1492, 1496-97 (M.D. Fla. 1989), aff'd 888 F.2d 766 (11th Cir. 1989).

> These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates -- as well as the relative importance of fair notice and fair enforcement -- depend in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test. . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequencs of imprecision are qualitatively less severe . . . .
>
> Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should be used.

Hoffman Estates, 455 U.S. at 498-499, 71 L. Ed. 2d 371-372 (footnotes omitted).

Among other things, the LCC prohibits:

> the excessive accumulation or untended growth of weeds, undergrowth or other dead or living plant life, or rubbish, debris, trash, including but not limited to household furnishings . . . upon any lot, tract, or parcel of land within this City . . . to the extent and in the manner that such lot, tract or parcel of land is or may reasonably become infested or inhabited by rodents, vermin or wild animals, or may furnish a breeding place for mosquitoes, or threatens or endangers the public health, safety or welfare, or may reasonably cause disease. . .

The plaintiffs did not contest the existence of the conditions that were cited as violations at Henton Lane on April 27, 1989. The court finds that there were scattered limbs/logs, scattered litter, and improperly stored appliances, auto parts, tires/rims, furniture, and building materials in the yard. Clearly the LCC prohibits a person from allowing the accumulation of such items in his or her yard. The court finds that the

conditions cited for at Henton Lane were clearly proscribed by the LCC and therefore, plaintiffs' challenge for vagueness must fail.

The plaintiffs also claim that section 28.17 (c) of the LCC is unconstitutional because it places the burden on any party cited to show that the condition cited does not constitute a public nuisance. The court finds this charge to be without merit since the LCC does not unconstitutionally place the burden of proof on the cited party.

Since the court has found for the defendants and against all of the plaintiffs, it is unnecessary to determine whether the Florida Sun is a proper party to the lawsuit. An appropriate order shall be entered.

(s) *L. Clure Morton*
L. CLURE MORTON
SENIOR U.S. DISTRICT JUDGE
FOR THE MIDDLE DISTRICT OF
TENNESSEE, SITTING BY AS-
SIGNMENT IN THE MIDDLE
DISTRICT OF FLORIDA

Supreme Court of the United States

No. A - 663

James Macon, Florida Sun, Gladys Macon,

Petitioners

v.

City of Orlando, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including April 16, 1993.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme
Court of the United States

Dated this 8th
Day of March, 1993.